

*Legitimacy in EU Cartel Control*

by Ingeborg Simonsson (Oxford: Hart Publishing, 2010), 440 pages, £85.00, Hardback, ISBN 9781849460057

In her thorough analysis of legitimacy in EU cartel control, Ingeborg Simonsson undertakes to explore the role of legitimacy in EC competition law in the light of a redirection in EC competition policy. While the focus was previously on vertical restraints, which were seen as a potential barrier to the integration of the Common Market, attention has now shifted to hard-core infringements such as cartels. The modernization also introduced a more decentralized approach to enforcement. The author aims to analyse the legitimacy of EC competition law policy with a view to both substantive and procedural law. While she restricts the substantive analysis to cartel control, the procedural analysis focuses on differences in the Member States in evidentiary standards, which have increased in importance following the decentralization of competition law enforcement.

As a *method* (Chapter 1), the author embraces the view expressed by contemporary scholars that legitimacy presupposes, on the one hand, that the law rests on rational foundations, and on the other, that average compliance can be ensured by the State. She further proposes to measure her findings against US antitrust law, which she views as a more advanced model.

Exploring the *role of legitimacy in decentralization* (Chapter 2), the author takes a close look at the principles of uniformity and effectiveness in their function as cornerstones of Common Market integration. Decentralization naturally raises concerns about uniformity (or the lack thereof) in the interpretation and application of Community law. The author points out that a low level of central enforcement mechanisms available to the Community creates a dependence on the goodwill of Member States to ensure average compliance. The fragmented enforcement structure calls for a rational law that can be understood and applied in a large number of legal cultures.

*Testing the legitimacy of the policy pursued* by the EC (Chapter 3) by trying to rationally reconstruct the law on cartels, she finds that the rationale behind EC competition law is to generate economic welfare within the Common Market. Based on empirical findings and economic theory as well as ethical considerations, she develops the argument that there is a strong imperative for a prohibition against cartels and for spending public resources on cartel control. She concludes that the EC Commission's policy shift from vertical restraints to cartels makes sense with regard to economic and legal theory, and corresponds to conceptions prevailing in society. In her analysis, the author considers cartels as forums rather than a specific type of behaviour, and cartel control as structural rather than behavioural. Since economic theory, according to the author, finds

its way into EC cartel control mainly through the enforcement priorities of the Commission, she wonders about the impact of economic theory in a decentralized system.

The examination then turns to the *legitimacy*, i.e. rationality, of *substantive cartel law* (Chapter 4). The author considers that if Community jurisprudence has managed to provide rational law with a high level of internal consistency, an EU-wide application in a variety of legal-cultural traditions should not be a problem. If, on the other hand, there are shortcomings in rationality from the start, or internal inconsistencies in the Community law, they will manifest themselves in an inconsistent decentralized enforcement. Therefore she examines whether some central notions in EC law on cartel control have been interpreted in a way that is rational, internally consistent, and possible to understand.

The author finds that Community jurisprudence is confusing on the question of *per se* prohibitions. Concerning the effect on trade concept, she detects a conflict between a free movement approach and a competition welfare approach. Starting from the premise that EC competition law protects competition and integration, the author develops a deterrence-based theory of effect on trade. She proposes that small-scale restrictions should be outside the effect on trade concept, even if cartels or other hard-core restrictions are at hand. According to her concept, small-scale is to be understood as not threatening welfare throughout the EU but only locally, and consequently not challenging public confidence in the Union. Cost aspects and over-deterrence problems point, in the author's view, in the direction of reserving application of cartel control to situations in which multinational companies are involved, or companies with a significant amount of inter-State trade. However, an effect on trade should be assumed in every situation where cooperation between Member States or between a Member State and the Commission may be expected to be of use.

Also, the author explains, the jurisprudence on the delimitation of the application of EC cartel law is directed towards placing it within its context within the Treaty, rather than based on a deterrence concept. And finally, the law on responsibility for companies within a group, while essentially deterrence-based, displays a number of ambiguities.

The author concludes that 'jumping from one theory base to another, depending on which notion of [the relevant law] is being analysed, must be considered problematic'. She urges the Community courts 'to be more pedagogic in order to illustrate the rational foundations of the law to all actors'.

In Chapter 5, the author turns to the issue of *evidentiary standards*. Following the modernization, the enforcement of the EC competition rules has become decentralized, but without any harmonization of the Member States' national competition procedures. The Community courts have developed a minimum standard of proof which applies. National rules on evidence must be interpreted

to fit the objectives laid down in Community law. However, variations in outcomes remain possible.

The presumptions developed by the Court of Justice in cartel cases, such as the opt-out principle for cartel meetings and the presumption of pursuant market behaviour once collusion is shown, must be considered, according to the author, as interpretations of the concept of burden of proof. The direct applicability of Regulation 1 means that the presumptions apply in national cartel procedures. Those presumptions constitute general principles of Community law and form part of the rights of the defence.

The legal-theoretical basis for the Community courts' jurisprudence on evidence is still in its infancy. It appears that the courts are drawing legitimacy from the ECHR, while at the same time the case-law on evidence may be seen as deterrence-based. The author calls for an open discussion on the need to balance the rights of the defence with deterrence concerns.

The author thinks that the decentralized enforcement system will fail to produce coherent outcomes. This would be in contrast with the uncompromising requirements from the Court of Justice on the consistent application of substantive rules, an objective that was emphasized in the preparatory works to the legislation. In the author's view, uniformity in substance and national competence on standard of proof are opposing values that seem to be cancelling each other out.

The author further analyses the *relation between national competition procedures and EC law* (Chapter 6). Fundamental rights and general principles developed by the Community courts must be observed by national authorities and courts in their application of EC competition law. This renders necessary a comparative approach, in which national procedure must continuously be evaluated in relation to EC law. Such a know-how intensive exercise calls for considerations about the composition of national authorities and courts. There is a risk, the author states, that increased legitimacy through a common minimum standard of protection will be outweighed by the new challenges faced by national authorities and courts.

The legitimacy issue is of particular importance with regard to *finis and sanctions* (Chapter 7). The author repeats that laws are only legitimate if the State can guarantee average compliance. Weak enforcement signals that the State is not serious about the legislation and consequently undermines the law's legitimacy. A high level of enforcement signals a strong commitment. Legitimacy is particularly important when competition law infringements are penalized.

The Commission's policy on sanctions prior to 2006 has failed, in the author's opinion, to achieve legitimacy; Community courts have not developed any doctrine on how fines should be calculated.

Fines and sanctions imposed in Member States in EC competition law cases are governed by national law. However, there is an obligation under EC law that sanctions be effective and deterrent.

In the author's opinion, the deterrence model, where sanctions serve to prevent infringements, is preferable to a retributive penal theory, where the goal is to neutralize the advantage gained through the offence and to communicate moral blame through just punishment of the offender. The deterrence model, as the author explains, allows for an economics-based calculation of fines. By comparison, a fining policy according to which the competition authority must prove, on a case-by-case basis, the overcharges resulting from the cartel, seems inefficient.

The term 'leniency' refers to a system according to which an undertaking can obtain immunity or the reduction of fines in exchange for reporting the infringement to the authorities. There is no indication so far that Member States are under an obligation to introduce, or refrain from introducing, a leniency programme with respect to EC competition law cases. However, if leniency is employed in relation to infringements of national competition law, the principle of equivalence should result in application of the same regime. The author considers that perhaps a duty to design a national leniency programme might be deduced from the Member States' obligation to take all measures necessary to guarantee the application and effectiveness of Community law.

She also thinks that efficiency considerations should lead to unilateral adoption of leniency programmes in Member States, even if there is no duty under EC law to do so. Cartelistic practices and agreements are mostly kept secret by the parties, wherefore only the members of the cartels themselves are able to alert the competition authorities and provide them with 'smoking gun' evidence. The design of leniency programs is consistent with the game theoretical model of the so-called 'prisoner's dilemma'. Providing a direct incentive to confess creates distrust among the members of the cartel, which strengthens the incentive to confess. Experience with leniency programmes in the USA shows the success of this policy.

The author concludes that while there is a high level of normative legitimacy for efficient sanctions, there is a low level of empirical legitimacy for the actual policy that was pursued, due to the lack of foreseeability of outcomes. The Commission's 2006 fining guidelines are more deterrence-based than the previous policies, but still rest to a considerable extent on a retributive theory. This reflects, in the author's view, at least to some extent legal theory whereby deterrence theory must be combined with perspectives of proportionate justice. Although general principles of EC law (including legal certainty) apply when Member States impose fines under EC competition law, there remains considerable room for discretion. The absence of a harmonized system for sanctions enables Member States to stick to the principles established under national law, increasing legitimacy as perceived locally. On the other hand, national solutions should ideally give way to allow for the introduction of the most efficient system. Further, the lack of harmonization could give rise to indignation if

undertakings perceive that similar infringements are treated differently depending on which Member State brings proceedings.

In the last chapter, the author draws her conclusions with regard to *sourcing legitimacy*. As she explains, decentralization sought to cure two types of legitimacy deficit. Prior to modernization the Commission was unable to ensure average compliance as a result of its focus on vertical restraints and its administrative burdens caused by the former notification system. On the other hand, Member States were reluctant to take part in enforcement. Decentralization has consequently raised expectations on average compliance.

At the same time, though, decentralization has exposed new problems. Legitimacy presupposes not only average compliance guaranteed by the State, but also that the norms that are enforced are legitimate.

The rationale behind competition law in general is the view that competition is valuable to society. From an economical standpoint, competition between undertakings on a market ensures the efficient allocation of resources. In EC competition law, this goal is coupled with the objective of promoting the integration of the Common Market.

The author identifies a systemic enforcement deficit in EC competition law control, which derives, on the one hand, from the fact that competition law is very complex and requires expert skills, and on the other, from the principle of institutional autonomy. Under the latter, Member States are empowered to organize the implementation, application, and enforcement of Community rules in accordance with their national legal systems, which undermines any systemic efforts to ensure that adequate structures are built nationally. This enforcement deficit, the author explains, cannot even be cured by an increased rationality of the law.

The efficiency of competition law enforcement in the EU, the author submits, should not be measured in terms of uniformity and effectiveness, but with reference to whether the infringements that generate the highest welfare losses are exposed and deterred from. She proposes that the more resourceful and well-performing Member States should take a lead regionally in EC competition law enforcement, creating a more efficient, albeit geographically uneven, enforcement system.

The author further submits that the policy shift from control of vertical restraints to cartel control represented a downgrading of the integration objectives and a corresponding upgrading of the economic theory that has shaped competition law (at least in the US). The author assumes, based on said economic theory, and from the widespread acceptance in society of the pursuance and fining of hard-core horizontal restraints, that EC competition law is substantially legitimate. She supports this view with the similarity of substantive EC law on cartels with US law.

By undertaking to test the legitimacy of EU cartel control with regard to substantive as well as procedural aspects, the author has taken on a monumental task. Discussing the rationality of the law is, of course, a very far-reaching goal, which touches on economical, political and, if pursued in an in-depth fashion, even philosophical aspects. However, the author restricts herself to the more manifest aspects which arise in the wake of the modernization which has brought about a decentralization of competition law enforcement. While it is clear that a multidisciplinary analysis of both substantive and procedural law on cartels could hardly have been contained in one book, her restricted analysis of 'legitimacy' creates less opportunity for ground-breaking new findings. Explaining the rationality behind substantive competition law must be based on well-known theories if new empirical findings or interdisciplinary aspects are not included. It is not surprising that the author concludes that the decentralization of the enforcement creates deficits concerning the uniform application of Community cartel law, and that not even increased rationality of the law will cure this enforcement deficit. As the author states at the very beginning, rationality and average compliance are additional, not alternative, prerequisites of legitimacy.

The author undertakes the difficult task of trying to find a solution to the legitimacy problem. Her proposition, whereby the best-performing Member States take a lead in the decentralized enforcement of EC competition law, is interesting and may well correspond to the actual outcome, in the sense that the less experienced jurisdictions will model their practice on more advanced ones. However, such an approach could not be managed in a systematic manner (by whom?) and the outcome will therefore remain patchy.

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